

	Link to Final Agency Decision
	OAH Docket No. 2-2200-17483-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA POLLUTION CONTROL AGENCY

In the Matter of the Administrative Penalty Order Issued to Birch Creek Properties, LLC	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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The above titled matter came on for hearing before Administrative Law Judge Raymond R. Krause (the ALJ) on October 3, 2006 at 9:30 a.m. at the Minnesota Pollution Control Agency, 520 Lafayette Road, St. Paul, Minnesota 55155.

Kathleen L. Winters, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, Minnesota 55101 appeared on behalf of the Minnesota Pollution Control Agency (MPCA). Nancy Bausman, 5140 Greenwood Court, Greenwood, MN 55331 appeared as sole owner of Birch Creek Properties LLC (Respondent).

STATEMENT OF THE ISSUES

Whether the Administrative Penalty Order (APO) issued to Birch Creek Properties, LLC was warranted and whether the mitigating factors in this case were properly considered.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. At all relevant times, Respondent, Birch Creek Properties, LLC, was owned and operated by Nancy Bausman.
2. Respondent owned several properties in Greenwood Minnesota, including a single family residence at 5085 Highview Place (the Property).

Respondent planned to demolish the structure on the Property in order to develop the lot for new construction.

3. Respondent engaged Leisch & Associates to perform an asbestos survey of the Property. Leisch & Associates is an environmental contractor.

4. Steven Carlson, a state accredited asbestos building inspector with Leisch & Associates, performed an inspection of the Property. Carlson found asbestos present in three types of material contained in the Property. Carlson estimated that there was between 200 and 250 square feet of linoleum and vinyl flooring and cement siding that contained asbestos. In follow up phone conversations with Respondent, Carlson told Respondent that under Minnesota regulations, the asbestos-containing materials were regulated. However, because these regulated materials were not "friable" in their current form, they could be removed by her without engaging a certified abatement contractor as long as the materials were not broken up and made "friable". Friable is defined as material that can be crumbled to a dust or very small particulate with one's fingers.

5. Respondent engaged a person who was not certified to remove regulated material and who is no longer in the U.S. to remove the regulated materials.

6. In response to a neighbor's complaint that material was being removed improperly, the MPCA conducted an inspection of the Property on July 26, 2005. The inspection revealed the cement siding had been removed, broken up and put into unsealed plastic trash bags and unsealed plastic trash cans which were covered by a tarp. Further inspection revealed that the broken siding had crumbled and produced significant dust and particulate and did not appear to be wet or have been wetted down as per regulation. In addition, small pieces of broken siding were found outside the trash cans and bags, some as far as 6-8 feet from the house.

7. Respondent was informed of the violations and ceased work immediately. Respondent finished the removal of the regulated materials in a manner consistent with the regulations.

8. On May 4, 2006, the MPCA issued an APO to Respondent alleging several violations. The APO set forth corrective actions to be taken by Respondent and assessed a penalty of \$3,500.

9. The amount of the penalty was determined using a standardized matrix for determining a base penalty and then adjusted for aggravating or mitigating circumstances. In this case the base penalty was determined to be \$5,000 which is the lowest recommended base penalty for a serious violation. The base penalty was further reduced because the Respondent had no previous

violations, was unlikely to violate again, and the violations did not result in financial gain to Respondent. The resulting adjusted penalty was \$3,500.

10. On May 17, 2006, Respondent requested a review of the APO.

11. Respondent does not contest the violations although Respondent calculates that the amount of siding was closer to 160 square feet than the 200 square feet estimated by Mr. Carlson. Respondent, however, seeks to have the penalty reduced or eliminated because the amount of the regulated material was minimal, no actual harm is alleged, and because she stopped work immediately and proceeded to comply with regulations thereafter.

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§14.50, 116.072, and 116.073 (2002).

2. The Commissioner has given proper notice of the hearing in this matter, and has fulfilled all procedural requirements of law and rule.

3. The violations cited in the Notice and Order for Expedited Hearing are not contested and are a sufficient basis upon which the Commissioner may impose an Administrative Penalty Order. The penalty imposed by the APO is reasonable and falls within the range permitted by statute.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: The Commissioner affirm the Administrative Penalty Order.

Dated: October 11, 2006

s/Raymond R. Krause

Raymond R. Krause
Administrative Law Judge

Reported: Taped, 3 tapes
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Minnesota Pollution Control Agency (Commissioner) will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.63, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

Respondent is a small real estate development company. It was formed essentially to clear three lots of existing buildings and redevelop them or resell them for development. In attempting to comply with the regulation of asbestos containing substances, Respondent requested advice from the MPCA. The advice given by the MPCA was to contact a certified inspector to have a survey of the property completed. Respondent did contact a certified inspector and had the survey done.

The survey results showed that the property had floor tiles, siding, and vinyl floor sheeting that contained asbestos. The estimated amount of all the regulated material was between 160 and 250 square feet. Respondent called the inspector for advice on what to do about removal and disposal of the regulated material. The inspector advised her that, as long as the material was maintained in its solid form, it could be removed and disposed of without hiring a certified abatement contractor. The material would only require certified handlers if it became friable.

Respondent then hired an uncertified individual to remove and dispose of the regulated material. This individual broke the siding into pieces and put the pieces into trash bags and cans. The bags and cans were not sealed nor were the contents wetted down to prevent airborne particulate from being emitted.

A neighbor complained to the MPCA and an inspector was dispatched to the site. The inspector found the site as described above and notified Respondent. Respondent ceased work immediately and later had the regulated material properly disposed.

Respondent does not deny that the regulations pertaining to the handling and disposal of regulated materials were not complied with by her employee. She does, however, argue that because she was new at this business, was a one-time developer who tried to follow the rules but made a mistake, and who immediately attempted corrective action upon learning of the mistake, the penalty should be reduced more than it was.

Based on the grid used by the MPCA to calculate the penalties in cases like this, the highest base penalty for a similar set of violations could be as high as \$10,000. Because of the factors Respondent mentions, the MPCA chose a base penalty of \$5,000 which is the lowest possible for a serious violation. The MPCA then further reduced the final penalty to \$3,500 for the mitigating factors.

The MPCA followed its longstanding internal procedures for determining a penalty. It did show leniency for a one-time violator. The fact remains that the violation was serious and that a developer has the responsibility to make sure that he or she knows precisely what the rules require when dealing with known

carcinogenic regulated materials. The penalty is not unreasonable in light of the serious nature of the violations and should be affirmed.

R.R.K.